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FM AMCONSUL DUSSELDORF
TO RUEHC/SECSTATE WASHDC 0106
INFO RUEHDL/EUROPEAN POLITICAL COLLECTIVE
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UNCLAS SECTION 01 OF 02 DUSSELDORF 000002

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E.O. 12958: N/A

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SUBJECT: ONLINE SEARCHES: CONSTITUTIONAL COURT LIKELY TO OVERTURN KEY NRW LAW

REF: A. A) 07 DUSSELDORF 0037

[¶](#)B. B) BERLIN 1398

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[¶](#)11. (SBU) Summary: Well informed sources in North-Rhine Westphalia (NRW) expect the Federal Constitutional Court in Karlsruhe in early 2008 to overturn path-breaking amendments to NRW legislation allowing online searches in terrorism and other cases. The online language, which amended an earlier statute governing activities the Office of the Protection of the Constitution (OPC) is permitted to undertake, has not been applied while the case was under review, although it went into effect on December 30, 2006. A primary drafter of the law and a lead complainant told us recently that they expect the Court to declare the amendment unconstitutional, but not to prohibit online searches per se. Although national law enforcement authorities have stepped up their calls for a speedy resolution of this issue, calling it imperative that they have access to this tool to combat terrorism, a Karlsruhe rejection of the NRW legislation would be a further setback for Federal Interior Minister Wolfgang Schaeuble (CDU), whose own draft proposal to enable online investigations at a national level has been stalled due to resistance from both opposition parties and the SPD coalition partners. End Summary.

NRW Regulation of Online Searches on Shaky Ground

[¶](#)12. (SBU) In a recent meeting with CG and Pol/EconOff, Hartwig Moeller, the President of NRW's OPC and one of the primary drafters of the OPC law amendment, outlined some of the challenges facing the case, observing "In retrospect, we should have been more precise in our wording of the law." For example, Moeller said the NRW law targets Internet communication only and (unlike Schaeuble's proposal) does not include the search of hard drives. Former Federal Minister of the Interior Gerhart Baum (FDP), a lead complainant in the case (ref A), told Pol/EconOff, "If the intention of the law was to distinguish between the two, then the law should have reflected this. As it is written, it does not." Former Federal Justice Minister and FDP Bundestag member Sabine Leutheusser-Schnarrenberger took a slightly different tack, telling the press recently that however "dangerous" Schaeuble may be "for the rule of law in Germany" ... "online searches (in some form) will come."

[¶](#)13. (SBU) Moeller explained that other issues have further complicated the case. After the case went to court, he learned of a personal and ideological rivalry between NRW chief counsel

Professor Dirk Heckmann and the Constitutional Court's Judge Wolfgang Hoffmann-Riem, who might use his position to rule against his adversary, and thus against the NRW law. In addition, the SPD has stepped back from supporting the measure, which it drafted while it was still governing NRW, for domestic political reasons. Finally, developments in telecommunications technology and Islamist behavior using the Internet have raised subsequent questions about parts of the NRW law, Moeller stated.

Court's Opinion: A Possible Roadmap for Future Legislation

¶14. (SBU) Both Moeller and Baum expect the Constitutional Court to overturn the law, as written. Moeller was pessimistic, predicting that major parts of the media and political opposition will gleefully call the ruling on NRW's attempts to forge new ground in this major new legal area a "legal slap in the face." At best, he hoped the opinion would set forth crystal clear guidelines that will allow parliaments to pass new legislation and allow law enforcement agencies to get to work. He expressed concern, however, that the ruling may impose too stringent guidelines to enable OPC personnel to use online searches effectively. Baum did not oppose searches of Internet communications in general but opposes online searches of hard drives on private PCs, calling them "invasions of privacy."

Comment

¶15. (SBU) The Federal Constitutional Court decision on the NRW regulation of online searches expected in early 2008 will have far reaching implications for the work of German law enforcement agencies and intelligence services at all levels. As the first (and thus far only) German state to regulate online searches by amending state law, NRW has been a trailblazer for this issue nationally. In recent end-of-year statements, national law enforcement authorities including both the OPC and BKA Presidents called for a speedy resolution of this issue, terming it imperative to clarify the rules governing this critical anti-terrorism tool. However, if the court rules as our

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interlocutors predict, it will send legislative efforts back to the drawing board and further delay use by law enforcement authorities of an important anti-terrorism tool. The ruling is also likely to adversely affect the plans of Federal Interior Minister Schaeuble, who seeks national legislation to extend online searches beyond the monitoring of Internet communications to hard drives and to authorize more agencies, such as the BKA, to use these means. End Comment.

¶16. (U) This message was coordinated with Embassy Berlin.
BOYSE